LE MERCIER'S FINE FURNISHINGS PTE LTD & ANOR

v

ITALCOMM (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' JAMES FOONG J
[CIVIL NO: S5-23-85-1994]
7 AUGUST 1996

DEFAMATION: *Libel – Natural and ordinary meaning of statement – Whether defamatory – Test – Whether that of the "ordinary person" – Statement did not expressly refer to plaintiffs – Plaintiffs and defendants the only dealers of the relevant products – Whether statement could still be defamatory of plaintiffs – Whether innuendo could arise by reason of special knowldge – Non-tendering of evidence to show possession of extrinsic knowledge – Whether necessarily fatal – Damages – Principles.*

The plaintiffs and the defendants were companies dealing with and selling Italian furniture. Sometime in March 1994, to mark the opening of their showroom in Kuala Lumpur, the plaintiffs took up an advertisement in the New Starits Times wherein they described themselves as dealers in fine furniture imported from "Italy, France, Spain and parts of Europe". Accompanying the descriptions were various items of fine European classical furniture and accessories. Some 4 months later, on 2 July 1994, to publicise their products which they marketed through the trade name "Abita Italia", the defendants took up an advertisement in the same newspaper, in which, apart from displaying their logo and trade name, and the various items of European classical furniture and accessories, they called themselves as "Italy leading supplier of fine Italian furniture ABITA ITALIA, is the only Italian display centre in Kuala Lumpur".

The plaintiffs, being the defendants' only competitor selling the relevant class of products, alleged that the defendants, by the above advertisement, had defamed them as the same had injured their credit and reputation among right thinking members of the public. They further alleged that the phrase "only genuine Italian" in the statement implied that only the defendants were dealing with genuine Italian made furniture, and that the plaintiffs were dishonest or otherwise engaged in activities of a fraudulent nature.

Held:

[1] To determine the natural and ordinary meaning of the statement, the test to be employed is that of the "ordinary man" as the term is defined in *Lewis v. Daily Telegraph viz.* a person "who does not live in an ivory tower and he is not inhibited by the knowledge of the rules of construction so that he does read between the lines in the light of his general knowledge and experiences of worldly affairs".

[2] The statement taken as a whole could bear only one meaning and that is that Abita Italia is the only display centre in Kuala Lumpur that sells genuine quality Italian made furniture to the exclusion of all others. By inferment, this would mean that all other show rooms selling Italian furniture are involved with fake or imitation goods. Similarly, this would lead to an imputation that any person or persons dealing with this type of furniture, other than the defendants are dishonest and/or otherwise engaged in activities of fraudulent nature. The statement is therefore defamatory.

[3] Although the plaintiffs are not expressly named, the words may still be considered to be referred to the plaintiffs, if the ordinary sensible readers with knowledge of special facts could and did understand them to be referred to the plaintiffs. For this, there must be some extrinsic facts so known to some readers who knew the plaintiffs, such that, these readers would understand that it was the plaintiffs that were being referred to. Again, the test here is that of a reasonable sensible man.

[4] In the present case, the special facts required relate to that of the plaintiffs being the only other retailer engaged in this special class of trade, and that the alleged defamatory statement would be sufficient to entitle a reasonable man with this special knowledge to interpret the words to mean that the plaintiffs were dishonest and/or dealing in fake and/or imitation items of Italian furniture purportedly as genuine, and they did in fact cheat its clients.

[5] The display items accompanying the advertisements clearly identified both parties to be selling similar type and class of products. A comparison of three to four items displayed in the plaintiffs' advertisement showed that they are virtually identical to the items as advertised by the defendants. These facts would classify the parties as the only two retailers in this country dealing with this class of products. This being the case, readers of the advertisements, and all those who had dealt with either parties, would reasonably believe that the defendants' statement could only point to the plaintiffs. The statement is thus defamatory by their ordinary and natural meaning.

[6] The non-tendering of evidence through witnesses to show possession of extrinsic knowledge that the plaintiffs are the only other retailer besides the defendants engaged in this special class of trade, is not fatal to the plaintiffs' claim. Fom the evidence as tendered, there can be no other inferences than the existence at the material time of the plaintiffs and the defendants being exclusively involved in this nature of trade. The advertisements by both parties with descriptive words accompanied by prominent display of pictures of the products, would be sufficient for the reasonable reader to acquaint themselves of this extrinsic knowledge of the exclusive activities of the parties. Under such circumstances, as in

Tolley v. J.S. & Sons Ltd., there is no necessity for the plaintiffs to call witnesses specifically to testify on such special knowledge.

[Judgment for plaintiffs. Plaintiffs awarded RM100,000 in damages. Defendants injuncted to further publish the libellous statement]

Cases referred to:
Lewis v. Daily Telegraph [1964] AC 234 ***(foll)***
Rubber Improvement Ltd. v. Daily Telegraph Ltd. [1964] AC 234 ***(refd)***
Capital Countries Bank v. Henty [1880] CPD 514 ***(refd)***
E Hultons & Co. v. Jones [1910] AC 20 ***(foll)***
AJA Peter v. Nio & Ors. [1980] 1 MLJ 226 ***(foll)***
Tolley v. JS Fry & Sons Ltd. [1930] 1 KB 467 ***(foll)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 MLJ 493 ***(refd)***
The Institute of Commercial Management United Kingdom v. The News Straits Times Press (Malaysia) Bhd. [1993] 2 CLJ 365

For the plaintiff - Christopher Foo (M. Rajasekaran with him); M/s. Raja Darryl & Loh
For the defendant - Khoo Guan Huat (Ivan YF Foo with him); M/s. Skrine & Co.

JUDGMENT

James Foong J:

The lst plaintiffs are a Singapore registered company while the 2nd plaintiffs are a Malaysian company. They both market high quality European furniture primarily from Italy in Singapore and Malaysia and use the trade name 'Le Mercier' originated from its founders and current owners of both the plaintiffs. According to Mr. Mercier (PW1), he and his wife have been trading in this type of business for the past 14 years, initially in Singapore and then extended to Malaysia, which eventually led to the formation of both the plaintiffs. In March 1994, the 2nd plaintiffs set up their show room in Kuala Lumpur, one of the largest in this country for this type of trade.

The defendants, as claimed by the plaintiffs are engaged in similar trade and had started their business in 1992 with a display centre in Kuala Lumpur.

On 2 July 1994, the defendants took out an advertisement in the New Straits Times 'City Extra' section to publicise their products which are marketed through their trade name. 'Abita Italia'. Besides the prominent display of the defendants' logo and trade name, and surrounded by various items of their products, at the top left hand column bears the following words;

Italy leading supplier of fine Italian furniture ABITA ITALIA, is the only genuine Italian display centre in Kuala Lumpur.

The plaintiffs immediately took offence to this, claiming that not only is the above statement untrue, but also by their natural and ordinary and/or inferential meaning were understood to mean that "all other display centres, including the

show room (2nd plaintiffs') were not genuine in that they carried fake and/or imitation Italian furniture while declaring the same to be genuine" and/or "all other entities running display centres carrying Italian furniture, including the plaintiffs', were dishonest and/or otherwise engaged in activities of a fraudulent nature." They insisted that the above statement refers to them, or any one of them. Further, and/or in the alternative, by way of innuendo, the above statement "were understood to refer to the plaintiffs or any one of them, as dishonest and/or dealing in fake and/or imitation items of Italian furniture purportedly as genuine Italian furniture and the plaintiffs, or any one of them, in doing so, attempted to and did in fact cheat its clients." Under paragraph 12 of the statement of claim, it is asserted that, "the plaintiffs have been seriously injured in their credit and reputation and/or have otherwise been reduced in the estimation of right thinking members of the public."

The defendants though admitting that they did publish the above statement deny that by its natural and ordinary and/or inferential meaning it is defamatory nor refer to the plaintiffs. They also deny innuendo arise by reason of some special knowledge available to those to whom the words were published or by reason of some special meaning or inference to be attached to or drawn from the words in the said statement. They contend that "the words, 'the only genuine Italian display centre' describes Abita Italia as a display centre in Kuala Lumpur which displays only Italian furniture." This is for reason that the defendants" furniture sold in their display centre are exclusively Italian in that they do not sell, supply and/or display any other furniture apart from furniture of Italian origin. They feel that no reasonable and sensible reader of the advertisement would believe that the above statement refers to the plaintiffs and that the plaintiffs are not synonymous with Italian furniture. The defendants also deny that the plaintiffs have been seriously injured in their credibility and reputation.

To determine the cause of action based on whether by the natural and ordinary meaning of the said statement is defamatory, this Court must first find out what is the natural and ordinary meaning of the said statement, i.e. its literal and inferential form would convey to an ordinary person. The "ordinary person", as elaborated by Lord Reid in *Lewis v. Daily Telegraph* [1964] AC 234 @ 258 and accepted in our Malaysian Courts is, a person, "who does not live in an ivory tower and he is not inhibited by the knowledge of the rules of construction so that he does read between the lines in the light of his general knowledge and experiences of worldly affairs." Simultaneously, it has been accepted that "words understood by one person could be in a different way from another ordinary man and woman, for they have different temperament and outlook, some unusually suspicious, and some unusually naive, one must try to envisage people between the two extremes and determine what is the most damaging meaning they would put on the words in question" see *Rubber Improvement Ltd. v. Daily Telegraph Ltd.* [1964] AC 234. It is also necessary to stress that in considering this issue on the meaning, the "Court

must not put a strained or unlikely construction upon the words, if they are capable of bearing a number of good interpretation, it is unreasonable to seize upon one bad one to give the word a defamatory sense" *Capital Countries Bank v. Henty* [1880] CPD 514.

Reading the said statement, it is without doubt that the disputes concentrate upon the words, "only genuine Italian". To the defendants it is only genuine Italian display centre that sells exclusively imported Italian furniture. On the other hand, to the plaintiffs, it implies that only genuine Italian made furniture being sold in this centre. How about to the ordinary man, who will read in between the lines and possess of worldly knowledge? To this Court's mind, the ordinary sensible reader would read this second part of the statement in relation to the first. In the first part of this statement, the defendants have proclaimed themselves as "Italy leading supplier of fine Italian furniture". This would obviously centres upon the quality of the product. The word "fine is a description of quality and "Italy", in this context is associated with a product of excellence in style and craftsmanship from a country renown for this. When the quality of the goods is emphasised, as in this case, the statement taken as a whole could bear only one meaning and that is Abita Italia is the only display centre in Kuala Lumpur that sells genuine quality Italian made furniture to the exclusion of all others. By inferment, this would mean that all other show rooms selling Italian furniture are involved with fake or imitation goods. Similarly, this would lead to an imputation that any person or persons dealing with this type of furniture, other than the defendants are dishonest and/or otherwise engaged in activities of a fraudulent nature.

Having established the meaning of the words in the said statement to be defamatory, the next issue for this Court's determination is whether these defamatory remarks are published about the plaintiffs.

In this case the plaintiffs are not expressly named. Where words do not expressly refer to the plaintiffs, they may still be considered to be referred to the plaintiffs if, the ordinary sensible readers with knowledge of special facts could and did understand them to be referred to the plaintiffs. For this, there must be some extrinsic facts so known to some readers who knew the plaintiffs would understand that it was the plaintiffs being referred to see *E Hultons Co. v. Jones* [1910] AC 20. On this, again the test to be applied must be based on whether the reasonable sensible man, knowing these facts, could have reasonably believed that the plaintiffs were being referred to see the case of *AJA Peter v. Nio & Ors.* [1980] 1 MLJ 226.

When the 2nd plaintiffs opened their show room in Kuala Lumpur in March 1994, they took out a full page coloured advertisement in the New Strait Times to announce their physical presence. They have also inserted in this advertisement the address of the lst plaintiffs. Here, as in all subsequent advertisements of the 2nd plaintiffs, they described themselves as dealers in

fine furniture imported from "Italy, France, Spain and parts of Europe." Accompanying such descriptions are various items of fine European classical furniture and accessories. The defendants' advertisement in page 3 of enclosure 17, where the defamatory statement appears described the defendants also as retailer of the "finest Italian made furniture." Accompanying this description are, as similar to the 2nd plaintiffs' advertisements, a display in pictorial various items of European classical furniture and accessories. According to the plaintiffs, the ordinary sensible reader and all those who had dealt with the plaintiffs and/or the defendants would know, that the plaintiffs and the defendants are engaged in a specialised trade as retailers in selling fine imported furniture from Europe. In the opinion of the plaintiffs, the defendants are their only direct competitor.

The defendants on the other hand evaded the contention that the plaintiffs were and/or are their sole competitor, and insisted that there are also other similar retailers engaged in this nature of trade, such as Benze, Shellord or La Chatel. Besides, to them all retailers of imported furniture are their competitors. The plaintiffs however elaborated that, the products sold by Benze are of a lower quality range, not of a similar class as to that of the plaintiffs' and defendants' while, Shellord's product resembles more plastic than wood from Indonesia, and as for La Chatel, they are involved in soft furnishing (i.e.) dealing with fabrics rather than furniture. These explanations were never challenged by the defendants. Instead, to add absurdity, an advertisement in a magazine called 'The Peak' (Pl) where both the plaintiffs and the defendants had their similar advertisements inserted, the defendants attempt to draw the attention of this Court to an advertisement by 'Marmoidea' to support their contention of the existence of other importers of this type of products in this country. Sad to say, if one were to peruse this advertisement, it talks about "the finest Italian marble furniture." With this description and the pictorial accompanying, there is no doubt that this advertisement is only involved in marble materials and not furniture of the type as displayed by the parties which are principally made of wood.

It is also rather surprising that the defendants have included retailers of imported furniture from all other countries, including Taiwan as their competitor. Generally speaking this may be so but, by their own advertisement and similarly that of the plaintiffs did they not distinguish themselves as importers of fine furniture made in Italy for the defendants and Europe for the plaintiffs? Products from other parts of the world are distinctly excluded. Again, the display items accompanying these advertisements clearly identified both parties to be selling similar type and class of products. In fact, a comparison of 3 to 4 items of furniture displayed in the plaintiffs' advertisement at page 2 of enclosure 17 are virtually identical to the items as advertised by the defendants at page 3 of enclosure 17. Accordtng to the defendants themselves, they have even admitted through the evidence of DW1 that, some of these items sold by the plaintiffs could be source and sold by the defendants if the plaintiffs have no

exclusive sales rights to them. These facts, undoubtedly, would classify the parties as the only two retailers in this country dealing with this class of products.

Readers of these advertisements of the parties, and all those who had dealt with either parties, or know of them would be aware that the plaintiffs and the defendants are the only dealers in such class of products. When they, as an ordinary sensible reader, read of the defamatory statement in the context of the entire advertisement of the defendants in page 3 of enclosure 17, they would, in the opinion of this Court reasonably believe that it refers or points to the plaintiffs who are the only other retailer of such products.

Based on the reasons stated above, this Court finds that the plaintiffs have proven its case against the defendants in that the said statement is defamatory by their ordinary and natural meaning.

This Court shall now deal with the other separate cause of action - Innuendo. In order to succeed, the plaintiffs have to establish the existence some extrinsic facts which were known to the reader of the statement and such reader would be reasonably induced to understand the statement in a defamatory sense which went beyond or altered their natural and ordinary meaning, which could be regarded as secondary or extended meaning see *Lewis v. Daily Telegraph Ltd.* [1964] AC 234. The defendants have argued that no witnesses were called by the plaintiff to establish that they possess special facts known to them. They relied on the English Court of Appeal decision of *Tolley v. J.S. Fry & Sons Ltd.* [1930] 1 KB 467 to support the necessity of such evidence. The plaintiffs replied that this is not necessary as per the *ratio* of Viscount Hailsham in the same case of *Tolley v. J.S. Fry & Sons Ltd.* [1931] AC 333 in the House of Lords which reverse the decision of the Court of Appeal.

In the circumstances of this case, the evidence of the special facts required relates to that of the plaintiffs being the only other retailer engaged in this special class trade, and that the alleged defamatory statement would be sufficient to entitle a reasonable man with this special knowledge to interpret the words to mean that the plaintiffs are dishonest and/or dealing in fake and/or imitation items Italian furniture purportedly as genuine, and they did in fact cheat its clients. In the light of the contentions of the parties, the first issue must therefore rest upon whether non-tendering of evidence through witnesses to show possession of extrinsic knowledge that the plaintiffs are the only other retailer besides the defendants engaged in this special class of trade, is fatal to their claim. It is without doubt that the Court of Appeal in *Tolley's* case insisted on such evidence be tendered through witnesses, but the following passage by Viscount Hailsham throws a rather different light:

> This case is unusual in that the defamatory innuendo does not depend upon the words used of the plaintiff, but solely upon the circumstances in which the publication takes place. The argument for the defendants was that there was no

evidence called to prove that well-known persons were in the habit of allowing their names to be used for advertising purposes, and that in the absence of such evidence a jury could not be allowed to reach the conclusion that the publication impliedly represented that the plaintiff had given such permission.

My Lords, I gravely doubt whether any such evidence was necessary. The question here does not depend upon a state of facts known only to some special class of the community, but upon the inference which would be drawn by the ordinary man or woman from the facts of the publication. It is always difficult to determine with precision the amount of judicial knowledge which is permissible to a Judge or jury; but I am not satisfied that it would not be open to a jury, acting on their own knowledge as ordinary citizens, to assume that no reputable firm would have the effrontery and bad taste to take the name and reputation of a well-known man for an advertisement commending their goods without first obtaining his consent.

This Court finds the above views most persuasive, in that from the evidence as tendered, there can be no other inferences than the existence at the material time of the plaintiffs and the defendants being exclusively involved in this nature of trade. The advertisements by both parties with descriptive words accompanied by prominent display of pictures of the products, would be sufficient for the reasonable reader to acquaint themselves of this extrinsic knowledge of the exclusive activities of the parties. These advertisements are not of restrictive circulation but nationwide, and an ordinary reader of such advertisements would be in possession of this extrinsic facts. Under such circumstances, as in the case of *Tolley,* there is no necessity to call witnesses specifically to testify on such special knowledge.

Having established special knowledge, it is now necessary to consider whether the reasonable man with this special knowledge would interpret the words to mean what was alleged by the plaintiffs. In the opinion of this Court the reasonable man knowing that the parties are the only two establishments engaged in this nature of business would come to a conclusion that the alleged statement has an extended meaning to that of the plaintiffs being an immitator, cheat and retailer of fake goods. In this respect this Court also finds that the plaintiffs also succeed in their second cause of action for innuendo.

From here this Court shall now proceed to deal with the prayers sought by the plaintiffs. The first is the claim for damages. As the plaintiffs are corporations, the damage suffered could only be to its pockets where it can be compensated for loss of goodwill and income see *Lewis v. Daily Telegraph* [1964] AC 234.

The general principle in assessment of damages for libel, besides depending on the circumstances of each case, should take into consideration the following factors:

(1) the position and standing of the plaintiffs;

(2) the nature of the libel,

(3) the mode and extent of the publication,

(4) the conduct of the plaintiffs;

(5) the conduct of the defendants from the time of the libel down to the very moment of the verdict,

(6) the absence or refusal of any retraction or apology,

the cases of *MGG Pilai v. Tan Sri Dato' Vincent Tan Chee Yioun & Others* [1995] 2 MLJ 493, *The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd.* [1993] 2 CLJ 365.

Though there is a contention by the defendants that the publication did not extend to Singapore, but there is no denial by the defendants that the lst plaintiffs also have customers in Malaysia, particularly those of East Malaysia. Further, a common trade name of 'Le Mercier' are used by both plaintiffs. For this, damages should also be extended to the lst plaintiffs.

From the evidence adduced, it is not disputed that Mr. Mercier and his wife have been in this trade in this part of the world for a substantial period of time. Though the 2nd plaintiffs commenced business in Malaysia only in March of 1994, the lst plaintiffs have traded here earlier. It is not challenged that the plaintiffs' customers are from the royalty and upper class members of society. Their position and standing must have been well-respected and received to the extent that both the plaintiffs are using their name, 'Mercier' as their trade name. In the plaintiffs' trade, it is not only necessary, but also essential that the virtues of honesty and respectability must always be maintained. The defendants' libellous publication in the New Straits Times, City Extra section has extensive coverage being one of the leading daily in Malaysia. This would have reached out to many of the plaintiffs' customers or potentials who, upon reading will doubt the plaintiffs' credibility due to the nature of the libel. When brought to the attention of the offending statement by the plaintiffs and requested to stop further publication of the same, the defendants were adament and refused to comply. Instead further publications appeared. Obviously there was also no apology offered, nor were there any change or correction in the said statement by the defendants.

Such conduct of the defendants, in the opinion of this Court is unmannerly, offensive and loathsome. Though business rivalry between the parties exist, but there should be a certain degree of fair play, certainly not in the manner and method adopted by the defendants in this case. As the appellate Court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (supra)* has clearly

warned, "that libel does not come cheap", this Court hereby awards to both the plaintiffs a sum of RM100,000. With this also comes the granting of the injunction to prevent further publication of the libellous statement as requested for in prayer 2 of the statement of claim. Costs is also awarded to both the plaintiffs.

Reported by W.A. Sharif